March 22, 2024

Director Gustavo Velasquez
California Department of Housing and Community Development
2020 West El Camino Avenue, Suite 500
Sacramento, CA 95833

[Submitted via email: SLAguidelines@hcd.ca.gov]

RE: Local Government Coalition Comment Letter on Proposed Updated Surplus Land Act Guidelines

Dear Director Velasquez:

The organizations and entities listed herein respectfully submit this letter as public comment in response to the California Department of Housing and Community Development's (HCD) request for public comment on its Draft Updated Surplus Land Act (SLA) Guidelines issued February 23, 2024 (Draft Updated Guidelines).

Regrettably, HCD's Draft Updated Guidelines subvert necessary, carefully negotiated legal provisions secured through the legislative process, and conflict with plain statutory language of the SLA and its clear legislative intent. These draft guidelines threaten local governments' ability to appropriately and efficiently engage in statutorily authorized transactions involving agency property for the benefit of the communities we serve.

Four major areas of the most significant concern include the following:

1. **The Draft Updated Guidelines Misapply the SLA to Agency's Use Land and Improperly Purport to Apply the SLA to Exempt Surplus Land.**

As defined in statute, "agency's use" is a category of land which is neither surplus land nor exempt surplus land, for which the SLA preserves certain local agency prerogatives. AB 480 and SB 747 did not make material changes to the SLA's agency's use provisions, and the legislative process for each bill evinces clear legislative intent not to do so. The Draft Updated Guidelines would delete an existing definition of agency's use land in Section 102(d), which is consistent with the language negotiated by local government stakeholders to resolve concerns related to adding a definition of "agency's use" to AB 1486. This problem is exacerbated by the proposed Section 102(cc), which would change the definition of "Surplus Land" by incorporating a reference to the inaccurate Agency's Use definition proposed in new Section 104, therefore causing an inconsistency between the Surplus Land definition in the Draft Updated Guidelines and statute.

Additional comments on the Agency's Use revisions in the Draft Updated Guidelines include:

- Section 104 provides a new, altered definition of Agency's Use. As discussed above, Agency's Use should be returned to Section 102(d). Further, the proposed altered definition of Agency's Use in Section 104 does not track the carefully-negotiated statutory definition at Gov. Code Section 54221(c), and should be revised to accurately track the statutory language.

- Section 104(a)(4) applies to special districts' agency's use provisions. The proposed changes are inconsistent with the structure of statute and should be revised to track and be consistent with Gov. Code Section 54221(c)(2)(B). The statute plainly states that the authority to make an "agency's use" determination solely belongs to a respective local agency, when a local agency's governing body takes action in a public meeting declaring that the use of the site will do one of the following: (i) directly further the express purpose of agency work or operations, or (ii) be expressly authorized by a statute governing the local agency, provided the district complies with Section 54233.5. The Draft Updated Guidelines fail to clearly state that the determination for "agency's use" consistent with 54221(c)(2)(B) is made by the local agency. This contradicts the express language of the statute wherein the only requirement is that a local agency's governing body makes a finding in a public (i.e., transparent) meeting that the use of the site is authorized pursuant to the statute. This creates risks for disputes and litigation long after a special district makes appropriate public findings.

- Section 104(c) purports to require a local agency to provide supporting documentation to HCD prior to disposition of agency use land. This new mandate has no statutory support, and directly contradicts the SLA.

- Section 104(a)(2) provides that "Only land intended and, in fact, used in its entirety by a local agency for agency's use will qualify as agency's use…" and contains

provisions for land that is both agency's use and non-agency's use. This section has no statutory basis.

- Section 200(a), pertaining to the surplus land determination process, retains the following text: "Land must be declared either 'surplus land' or 'exempt surplus land', as supported by written findings, before a local agency may take any action to dispose of it consistent with an agency's policies or procedures." This text fails to contextualize the disposal of agency's use land, and continues to fail to distinguish agency's use land as not being the same as exempt surplus land.

- Section 103(c)(11), pertaining to an exempt surplus land category for special district agency's use, states the exemption as "Real property that is used by a district for agency's use expressly authorized in Government Code section 54221." However, the Current Guidelines reference 54221**(c)**, which applies only to special districts. Although this proposed change does not appear as a change in the redline of the Draft Updated Guidelines, it is a material change. The Draft Updated Guidelines should deliberately reference section 54221(c), as the Current Guidelines do, to specifically highlight the provisions enumerated there related to special districts, and thus the nexus to this particular category of exempt surplus land, rather than a generic reference to the broader, complex SLA statute. .

Moreover, the Draft Updated Guidelines continue to fail to include any reference whatsoever to the plain language of Government Code Section 54222.3, which conflicts with many of the proposed guidelines' changes related to exempt surplus land, and plainly states that: **"This article shall not apply to the disposal of exempt surplus land as defined in Section 54221 by an agency of the state or any local agency."** Unless a code section specifically references applicability to exempt surplus land, the presumption is that all the provisions of this article do not apply to "exempt surplus land" (i.e., upon determination by an agency that a parcel is "exempt surplus land"). For an example of where a single particular type of "exempt surplus land" is expressly referenced as subject to the SLA (pursuant to a process to comply with HCD approval), see Government Code Section 54221(f)(1)(P)(iv). The Draft Updated Guidelines unjustifiably place HCD in the middle of exempt surplus land determinations notwithstanding the statutory limitations in the SLA.

Additional comments regarding the Exempt Surplus Land revisions in the Draft Updated Guidelines include:

- Section 103(e) provides that "Any determination by a local agency that its surplus lands are exempt from the SLA must be supported by written findings and documentation, which shall be provided to HCD pursuant to section 400(e) of these Guidelines." This requirement is mostly a restatement of the Current Guidelines, as modified, but is not supported by statute and should be struck. Only limited exemptions have a documentation requirement. Notification to HCD is not required by statute. During the legislative process, a proposed notification requirement to HCD was struck from both AB 480 and SB 747, demonstrating clear legislative intent inconsistent with the Draft Updated Guidelines.

- Section 400(e), requiring notifications to HCD in connection with exempt surplus land determinations, is not supported by statute. An HCD notification requirement related to exempt surplus land disposals was struck from the enacted versions of both AB 480 and SB 747, demonstrating clear legislative intent inconsistent with the Draft Updated Guidelines.

- Section 500, pertaining to the HCD approvals process, purports to give HCD a role in approving exempt surplus land determinations by local agencies. This has no basis in statute.

2. The Draft Updated Guidelines Misapply SLA Penalty Provisions while Making Changes in Conflict with Statute.

AB 747 and AB 480 amended the SLA penalty provisions found in Government Code Section 54230.5 to provide a fair process for assessing and calculating penalties for specified violations of the SLA, while explicitly providing that such penalties shall not apply to violations that do not impact the availability and priority of, or the construction of, housing affordable to lower income households or the ultimate disposition of the land in compliance with the article, such as clerical errors. The Draft Updated Guidelines are inconsistent with and undermine these important statutory changes.

Additional comments on the penalty revisions in the Draft Updated Guidelines include:

- Section 501(b)(1)(A) includes the following language which is not in statute and undermines the recently enacted statutory limitations placed on Section 54230.5: "However, in no case are local agencies immune from penalties for failing to issue an NOA for surplus land, to notice the required housing and local public agency entities, to provide at least 90 days of good faith negotiations, or to provide a draft and final recorded affordability covenant to HCD. Any violations of the SLA that limit the opportunity of affordable housing entities to purchase non-exempt surplus land are not exempt from the penalties established in Government Code, section 54230.5." The "(e.g., the amount of affordable housing provided)" qualifier to the penalties exemption is similarly not in statute.

- Section 501(c) states: "A local agency that sells or leases surplus land without complying with Sections 200(a), 201, 202, 300, 400(a), and 400(b) of these Guidelines violates the SLA." This provision is not found in statute.

- Without limiting the comments regarding exempt surplus land discussed above, Section 501 should have language added that states: "A local agency shall not be liable for the penalty imposed by subdivision (a) if the Department of Housing and Community Development does not notify the agency that the agency is in violation of this article within 30 days of receiving the description." (see Section Gov. Code Section 54230.5(b)).

3. **The Draft Updated Guidelines Allow Third Parties to Issue Notices of Alleged Violations of the SLA Directly to Public Agencies with No Basis in Statute, Exposing Local Agencies to Unaccountable Interference with Operations.**

The Draft Updated Guidelines purport to grant third party entities (i.e., not HCD) the ability to issue notices of alleged violations of the SLA directly to local agencies. For example, Section 102(u) defines a "Notice of Alleged Violation" as a written communication sent to a local agency (with a copy to HCD) by a public or private entity (i.e., not HCD) alleging violations of the SLA.

Allowing third parties to directly allege a violation and trigger enforcement deadlines for local agencies without HCD review and determination of a violation is not supported by statute and could wreak havoc on local agency transactions and operations. This provision of the Draft Updated Guidelines is also inconsistent with Government Code Section 54230.5(a)(1) which imposes penalties for disposals of surplus land in violation of the SLA after receiving a notification from HCD.

4. **The Draft Updated Guidelines Subject Local Agencies to a Subjective and Open-Ended Definition of "Good Faith Negotiations."**

Government Code Section 54223 requires that "After the disposing agency has received a notice of interest from the entity desiring to purchase or lease the surplus land on terms that comply with this article, the disposing agency and the entity shall enter into good faith negotiations to determine a mutually satisfactory sales price and terms or lease terms. If the price or terms cannot be agreed upon after a good faith negotiation period of not less than 90 days, the local agency may dispose of the surplus land without further regard to this article.…" The Draft Updated Guidelines undermine the clear timelines established in statute by requiring in Section 202(a)(1)(C)(iv)(V) that a local agency not "arbitrarily end active negotiations after 90 days of good faith negotiations."

Section 202(a)(1)(C)(iv)(V) adds a subjective and open-ended requirement for a local agency to continue negotiating after 90 days even though 90 days of negotiations is all that is required by statute. This transforms what is a clear standard in statute into a subjective standard in the Draft Updated Guidelines, thereby interfering with local agencies' ability to efficiently conclude negotiations and transactions. This also exposes local agencies to litigation risk over whether the specific circumstances of a conclusion of negotiations after the 90 days required by statute was "arbitrary."

Another new subjective good faith negotiations component includes: "Make a serious effort to meet at reasonable times and attempt to reach agreement." (Section 202(a)(1)(C)(iv)(I)) These terms are subjective and will further create opportunities for disputes, litigation, and delay.

Although the four categories of concerns identified above are of critical importance, attached please find an appendix containing additional and more comprehensive comments and concerns for your consideration.

For these reasons, we respectfully request HCD amend the SLA Draft Updated Guidelines to correct the aforementioned issues. Further, to our knowledge, the development of these Draft Updated Guidelines failed to include any meaningful or recent meetings/dialogue with any of the local government stakeholders that HCD is aware are deeply interested in the development and application of any guidelines. We request an opportunity to meet with you to discuss our most significant concerns.

Sincerely,

Aaron Avery
Director of State Legislative Affairs
California Special Districts Association

Mark Neuburger
Legislative Advocate
California State Association of Counties

Paul E. Shoenberger, P.E.
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Tracy Rhine
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Jessica Gauger
Director of Legislative Advocacy
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California Association of Sanitation Agencies

APPENDIX

Page #	Citation	Text
Page 5	Section 101(b)(1)(C)	• As drafted, the updated guidelines purport to require proof of sending of NOAs to be provided to HCD. • This is not required by statute.
Page 6	Section 102	• The introduction paragraph to this section ends by stating: "For terms defined in statute, any changes to the statutory definition shall supersede the definition in these Guidelines." • The purpose and intent of this statement should be made clear. If statutory definitions supersede guidelines definitions, what is the purpose of guideline definitions which are not the same as, or in some cases inconsistent with, statute, as discussed below? • If the intention is only for prospective changes in statutory definitions to supersede Guidelines definitions, that is also improper. The statute controls, and the Guidelines cannot alter that foundational legal proposition.
Page 8	Section 102(g)	• As drafted, the updated guidelines provide a definition for "Description of Negotiations" with an affordable housing developer to be provided by a local agency to HCD prior to disposal of surplus land following a negotiation with an affordable housing sponsor. • The definition should explicitly exclude attorney client privileged and attorney work product documents and communications.
Starting at Page 8	Section 102(i)	• Updated guidelines add to definition of "disposition" by adding: "…land exchanged for monetary or nonmonetary consideration." • Now that there is a definition of "dispose" in statute, this definition is unnecessary. Please make a global

		change to delete references to disposition of surplus land and substitute "dispose" or "disposal" of surplus land. • Addition of "…land exchanged for monetary or nonmonetary consideration" to this definition or the dispose definition is not in statute. • Section 102(i) should copy the dispose definition from statute. • Proposed Section 102(i) includes sales in definition but does not exactly track statute; entire section should copy the statutory dispose definition verbatim. • Lease definition should track statute: "The entering of a lease for surplus land, which is for a term longer than 15 years, inclusive of any extension or renewal options included in the terms of the initial lease, entered into on or after January 1, 2024." • Proposed updated guideline inconsistent in the following ways: • Proposed update language at 102(i)(1)(B): "A lease with a term of 15 years or less that includes an option to extend or renew is a disposition if the sum of the term of the original lease and the extension or renewal is greater than 15 years." • Not supported by statute. • Proposed update language at 102(i)(1)(B): "A lease that is for a term of 15 years or less that includes an option to purchase is considered a disposition of surplus

		land at the time the option to purchase is exercised." • Purchase options not covered by statute; language should be struck. • Proposed update language at 102(i)(2)(A): "The entering of a lease for surplus land for a term of 15 years or less, inclusive of any extension or renewal options included in the terms of the initial lease." Should track statute "The entering of a lease for surplus land, which is for a term of 15 years or less, inclusive of any extension or renewal options included in the terms of the initial lease."
Page 11	Section 102(cc)	• Proposed updated guidelines add to definition of "surplus land." • All proposed additions should be reversed and this section should just track the definition in statute at Gov. Code Section 54221(b)(1). • Note that existing guideline definition contains a number of other slight inconsistencies with Gov. Gode Section 54221(b)(1) which should be reconciled by simply using the statutory definition of surplus land.
Pages 13 and 14	Section 103(b)(4) and (b)(5)(B) (related to legacy agreements)	• Both references to extensions due to litigation should state that the deadline begins to run again following the **final** conclusion of the

		litigation. This is consistent with statute and prior related guidelines.
Page 15	Section 103(c)(7)	• Removes language that specified exempt surplus land be declared exempt, and instead requires that it be disposed of. o Not consistent with statute.
Page 16	Section 103(c)(7)(A)(i)	• Typo – refers to (i) and should refer to (A)
Page 17	Section 103(c)(7)(C)(iv)	• Proposed update to guidelines purports to require concurrent residential and commercial unit construction for mixed use affordable housing exemption. Concurrent construction not required by Gov. Code Section 54221(f)(1)(H), only specified concurrent availability. First line of Section 103(c)(7)(C)(iv) should be struck.
Page 18	Section 103(c)(7)(E)	• Proposed update to guidelines again purports to require concurrent residential and commercial unit construction for mixed use affordable housing exemption. o Concurrent construction not required by statute.
Pages 18 and 19	Section 103(c)(8) (exemption for Land Subject to Valid Legal Restrictions)	• Enumerated list of valid legal restrictions in Section 103(c)(8)(A) uses language inconsistent with statutory enumerated list, leaving important language out. Resolve this by using statutory language at Gov. Code Section 54221(f)(1)(J).
Page 19	Section 103(c)(8)(B) (exemption for Land Subject to Valid Legal Restrictions)	• Section 103(c)(8)(B)(i) omits reference to "agreement" in Gov. Code Section 54221(f)(1)(J)(i)
Page 21	Section 103(c)(18) (exemption for Mixed-use developments by	• Section 103(c)(17)(A) refers to "land owned by transportation districts." Should say surplus land…

	Transportation Districts)	• Section 103(c)(17)(A)(iii) says "…before the agency is permitted to dispose of land for non-housing purposes…" Statute says before entering an agreement to dispose… (Gov. Code. Section 54221(f)(1)(S)(i)(IV))
Page 24	Section 103(f)	• Guideline should use language from statute. • Proposed guideline Section 103(g)(3) says: "Negotiating with a developer to determine if the lease provisions of Government Code section 54221(d)(2) can be met." o Guideline should simply track the statutory language at Gov. Code 54222(f)(4): "Negotiating with a developer to determine if the local agency can satisfy the disposal exemption requirements described in paragraph (2) of subdivision (d) of Section 54221."
Page 24	Section 104 (New Agency's Use)	• Agency's use should be returned to definition section as described above, and should track statutory language exactly. Guidelines are not consistent with agency's use definition in statute.
Page 24	Section 104(a)(2)	• "Only land intended and, in fact, used in its entirety by a local agency for agency's use will qualify as agency's use…" and provisions for land that is both agency's use and non agency's use. • No basis in statute.
Page 24	Section 104(a)(3)	• "Agency's use shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, office development, **or any such development designed to support the work and operations of an agency project.**" • Bolded, underlined language not in statute.

Page 25	Section 103(b) (eminent domain / agency use)	• This should be struck. No basis in statute.
Page 25	Section 104(c) (Notice of Disposition of Agency's Use Land)	• This section purports to require a local agency to provide supporting documentation to HCD prior to disposition of Agency Use land. • Entire section is lacking in statutory support, or directly contradicts statute. Section should be struck in its entirety.
Page 26	Section 200 (Surplus Land Determination Process)	• Section 200(a): Retained text: "Land must be declared either 'surplus land' or 'exempt surplus land', as supported by written findings, before a local agency may take any action to dispose of it consistent with an agency's policies or procedures." • Continues to fail to account for agency's use land not being exempt surplus land.
Page 27	Section 202: Disposing of surplus land	• Updates change: "Prior to negotiating the disposal of surplus land, ~~After~~ the governing board of a local agency ~~has held~~ must hold (did not appear as a redline change) the required public meeting to declare property as surplus land…" • Does not appear to be consistent with Gov. Code Section 54222. •
Page 29	Section 202(a)(1)(D) (exclusions from definition of participating in negotiations)	• Should be revised to add new statutory carve outs from the definition.
Page 34	Section 202(b)(3) (disposition of contiguous land)	• This wasn't changed by AB 480 / SB 747 and should not be changed now.
Page 37	Section 400(b)(1) –	• This section contains another reference to draft copies of restrictions. • "proof of delivery" to housing sponsors not in statute.

Page 38	Section 400(e) (notifications to HCD in connection with exempt surplus land determinations)	• Entire section not supported by statute. Should be struck. • An HCD notification requirement related to exempt surplus land disposals was struck from the enacted versions of both AB 480 and SB 747.
Page 39	Section 500(c) and (d) – HCD approvals process.	• Not supported by statute, again improperly purports to apply SLA to exempt surplus land.
Page 39	Section 500(e)(2)(C)	• Requires notification to HCD if a local agency ceases a transaction after receiving an NOV. Not required by statute. Should be struck. • "If a local agency resumes the existing disposition of land at a later date, all the provisions of subdivision (e)(2)(A) and (B) of this Section apply." Again, not consistent with statute, each transaction different, should be struck.
Page 39	Section 500(e)(3) (Orange County / Cities in Orange County)	• Sections dealing with Orange County and cities in Orange County again use findings letter language; statute just talks about notifications of violation.
Page 41	Section 501(a) (penalties)	• Available remedies language purporting to confer remedies broader than what are in statute. Statute at Gov. Code Section 54230.5 is limited as follows: "Notwithstanding subdivision (c), this section shall not be construed to limit any other remedies authorized under law to enforce this article including public records act requests pursuant to Division 10 (commencing with Section 7920.000) of Title 1." • Section 501(a) also purports to apply to disposals or attempted disposals of "land." This is in contravention of Gov. Code Section

		54222.3 which makes the SLA inapplicable to disposals of exempt surplus land.
Page 42	Section 501(b)(1) (penalties)	• Guideline applies penalties after an NOV or findings letter. Findings letter component not in statute.
Page 42	Section 501(b)(2)(B)(i) (penalties)	• Guidelines provide if the penalty funds deposited into the local housing trust fund have not been expended within five years after deposit, the funds shall revert to the state and be deposited into the Building Homes and Jobs Trust Fund or the Housing Rehabilitation Low Fund for the sole purpose of financing newly constructed housing units located in the same jurisdiction as the surplus land. ○ Housing in the same jurisdiction of the surplus land not required by statute. May have unanticipated complications for special districts.
Page 43	Section 501(b)(6) (appeals)	• 30 day appeals period should be triggered by notice of assessment to local agency.
Page 43	Section 501(b)(7) (appeals)	• Restore procedural safeguards from prior guidelines.
Page 43	Section 501(c)	• A local agency that sells, leases, or transfers surplus land without complying with Sections 200(a), 201, 202, 300, 400(a), and 400(b) of these Guidelines violates the SLA. • Not supported by statute. Should be struck.
Pages 43 and 44	Section 502 (b) and (c) (Private Enforcement)	• Notices of alleged violation and other provisions tied to or referencing such notices have no basis in statute and should be struck.